



In the Matter of:

JOHN GRIFFITH,

ARB CASE NO. 04-010

COMPLAINANT,

ALJ CASE NO. 02-STA-034

v.

DATE: February 20, 2004

ATLANTIC INLAND CARRIER,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota

FINAL DECISION AND ORDER

BACKGROUND

John Griffith filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that Atlantic Inland Carrier had terminated his employment as a long haul truck driver on December 28, 2001, in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A § 31105 (West 1997). A Department of Labor Administrative Law Judge (ALJ) heard the case and on October 21, 2003, issued a Recommended Decision and Order (R. D. & O.) finding that Griffith established by a preponderance of the evidence that Atlantic Inland had terminated his employment because he engaged in activity protected under the STAA and ordering relief including reinstatement, back pay, attorney's fees and costs and other non-monetary relief. On December 19, 2003, the ALJ issued a Supplemental Damages Order and an Attorney Fee Order.

In particular, the ALJ found that Griffith engaged in protected activity when he spoke with Officer Justice, a North Carolina Department of Motor Vehicles Officer, concerning the unsafe condition of his tractor and trailer on December 27, 2001, and

requested Officer Justice to inspect the tractor and trailer at the Efland, North Carolina weigh station on December 28, 2001. R. D. & O. at 14. The ALJ also found that Griffith made internal complaints on several occasions concerning safety problems with his truck. *Id.*

The ALJ also found that Atlantic Inland terminated Griffith's employment (an adverse action) in retaliation for his protected activities. The ALJ noted that Griffith's request that Officer Justice inspect his tractor and trailer, which resulted in the removal of the trailer from service and a fine, was "the straw that broke the camel's back" as far as Atlantic Inland was concerned. *Id.* at 16.

The ALJ considered Atlantic Inland's argument that it had legitimate reasons for terminating Griffith's employment, including his failure to follow truck repair protocol, by repairing the truck without prior authorization, purchasing items without authorization and declining to have maintenance performed on his truck. However, applying a dual motive analysis, the ALJ ultimately concluded that Atlantic Inland failed to establish by a preponderance of the evidence that, but for Griffith's protected activity, it nevertheless would have terminated his employment. *Id.* at 19.

In determining the amount of damages to which Griffith was entitled, the ALJ found that Atlantic Inland offered essentially no information regarding the availability of comparable jobs other than Griffith's supervisor's opinion that turnover was high throughout the industry. *Id.* at 23. The ALJ also determined that Griffith had diligently sought employment with at least 23 other trucking companies before obtaining a job as a driver with Fleet Source, Inc., which was substantially equivalent to his former employment with Atlantic Inland. Accordingly, the ALJ found that Atlantic Inland failed to carry its burden to establish the availability of comparable jobs, but even if such jobs were available, Atlantic Inland failed to establish that Griffith did not mitigate his damages. *Id.* at 23-24.

In reviewing and ultimately granting Griffith's attorney's fee petition (with a mathematical adjustment), the ALJ concluded that Griffith's counsel had demonstrated a high degree of competence. He also considered comparable hourly rates for attorneys practicing in the field of employment law, the services rendered, the expertise involved, the type of case handled, the risk of loss, and the ultimate benefit to the Complainant. Attorney Fee Order at 2. Atlantic Inland did not oppose the fee petition.

ISSUE

We consider whether the ALJ correctly found that Griffith established by a preponderance of the evidence that Atlantic Inland terminated his employment because he engaged in activity protected under the STAA, and if so, whether the ALJ correctly awarded damages and an attorney's fee against Atlantic Inland.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).¹ Pursuant to 29 C.F.R. § 1978.109(c)(1), the ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

The Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de novo. See *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063. Although permitted to do so,² Atlantic has failed to file a brief in opposition to the R. D. & O. Griffith initially filed a brief in opposition to the damage award, but subsequently withdrew it stating, "Complainant supports in all respects the recommended decisions and orders of [the ALJ]."

The R. D. & O. thoroughly and fairly recites the relevant facts underlying this dispute. We have reviewed the entire record. Substantial evidence clearly supports the ALJ's finding that Griffith established by a preponderance of the evidence that Atlantic Inland terminated Griffith's employment because he engaged in protected activity when he reported the unsafe condition of his truck and trailer to Officer Justice and requested a safety inspection which resulted in the removal of the trailer from service and a fine for safety violations.³ Substantial evidence also supports the ALJ's damage and attorney's

¹ This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

² 29 C.F.R. § 1978.109(c)(2)(2003).

³ See e.g., Transcript (Tr.) at 697 (May 8, 2003), Tr. at 82 (May 6, 2003) (supervisor testified that the events at the weigh station were "the straw that broke the camel's back"); Tr. at 74 (May 6, 2003) (supervisor probably would not have fired Griffith on December 28th if he had not gone to the weigh station); Tr. at 82-83 (May 6, 2003) (supervisor made up his mind to fire Griffith when he was at the weigh station); Tr. at 442-43 (May 7, 2003) (supervisor and dispatcher had discussed the possibility of discharging Griffith on December 27, but no agreement was reached); Tr. at 489-90 (May 8, 2003) (Griffith was never reprimanded for performance reasons and none of the actions he took during his employment were egregious enough to warrant a "write up" until he went to the weigh station).

fee awards.⁴ All three recommended decisions are in accordance with law. Therefore we affirm them.

Accordingly, we **ADOPT** the ALJ's Recommended Decision and Order, Supplemental Damages Order and Attorney Fee Order and **INCORPORATE** them as attached.⁵

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁴ See e.g., Tr. at 378-95 (May 7, 2003)(Griffith's attempted to gain employment with trucking companies); Claimant's Exhibit 20 (Griffith's employment log); Tr. at 396-398 (May 7, 2003)(Griffith obtained a truck driving position with Fleet Source, Inc.).

⁵ We note, however, that because this case was fully tried on the merits the ALJ unnecessarily conducted a prima facie case analysis, R. D. & O. at 7-17. See *Williams v. Baltimore City Pub. Sch. Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, n.7 (ARB May 30, 2003). See also *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855-856 (9th Cir. 2002).